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In the Supreme Court of the United States

OCTOBER TERM, 1995

SEATTLE LAKE SHORE AND EASTERN RAILROAD, INC.,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission abused its discretion when it found that petitioner's offer to purchase a half-mile long portion of a railroad line in downtown Seattle, Washington, for $10 was not bona fide, based on evidence that that portion of the railroad line had a substantial market value.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 55 F.3d 684 (Table). The Commission's final opinion (Pet. App. C1-C17) and the initial agency opinion (Pet. App. D1-D8) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1995. A petition for rehearing was denied on July 3, 1995 (Pet. App. B1). The petition for certiorari was filed on September 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act (Act) regulates the process by which rail carriers may abandon unprofitable lines. Of particular relevance here, the Act provides a mechanism by which shippers may obtain continued service on those lines, either by purchasing the line at or above "fair market value" as determined by the Interstate Commerce Commission (Commission),[1] or by subsidizing the carrier's continued operation of the line.[2] See generally 49 U.S.C. 10905. Section 10905 provides that, after the Interstate Commerce Commission issues a decision finding that "the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line," "any person may offer to pay the carrier a subsidy or offer to purchase the line." 49 U.S.C. 10905(c).

Under the Commission's procedures, an offeror must provide sufficient information to show that the offeror is financially responsible: that is, that it has the financial resources to fund the acquisition (see 49 U.S.C. 10905(f)(1)) and operate the line for two years (49 U.S.C. 10905(f)(4)). See 49 C.F.R. 1152.27(c)(1)(ii), 1152.27(c)(2)(iii). The offer also must approximate the purchase or subsidy amount proposed by the railroad or explain why that amount is excessive. 49 U.S.C.

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[1] Under the Act, "fair market value" of the line is ordinarily the net liquidation value of the rail properties for their highest and best nonrail use. See 49 U.S.C. 10905(f)(1)(C); *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 669-670 (7th Cir. 1982).

[2] See *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 629-631 (1984).

10905(c).[3] In addition, to start the Section 10905 process, the offeror must demonstrate that the offer is *prima facie* reasonable. See 49 U.S.C. 10905(d)(2)(B).[4] If the Commission finds both that the offeror is financially responsible and that the offer is *prima facie* reasonable, it must postpone the issuance of its certificate authorizing abandonment until the Section 10905 process has been completed. 49 U.S.C. 10905(d). Offers that are not *prima facie* reasonable are not sufficient to start the Section 10905 process; however, in such cases, the railroad is permitted to abandon the line in question, or to agree to alternative uses for the line.

2. a. This case involves a decision by the Commission in April 1994 that a $10 offer to purchase a 3.57-mile railroad line between Interbay and Terry Avenues in downtown Seattle, Washington (the Terry Avenue Line) was not *prima facie* reasonable, and hence, not sufficient to start the Section 10905 process. The dispute has its roots in a series of agreements entered into between 1988 and 1991 between the City of Seattle (Seattle) and the Burlington Northern Railroad Company (BN) governing the future of various railroad lines within Seattle,

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[3] Section 10905(c) provides in pertinent part:

> If the offer to subsidize or purchase the line is less than the carrier's estimate * * *, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

[4] Section 10905(d)(2)(B) provides that, if the Commission finds that it is likely that the offer would be equal to "the acquisition cost of that part of the railroad line[,] the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance."

including the Terry Avenue Line. Those agreements (the Trail Agreements) gave Seattle a right of first refusal over the entire right-of-way within which the Terry Avenue Line operated in the event that the Commission approved the line for abandonment. That right-of-way was, in some places, as much as 100 feet wide. The Trail Agreements further provided that, in return for a 30-foot-wide strip of the right-of-way, Seattle would relieve BN of its obligations to restore crossings and streets upon the cessation of rail use. Additionally, Seattle would pay BN fair market value, determined at the time of the transaction, for the remaining width of the right-of-way. See Pet. App. C5-C8 & n.15.

On October 1, 1993, BN petitioned the Commission for authority to abandon the Terry Avenue Line. That petition was not contested by any shipper. During the abandonment proceeding, Seattle thereupon expressed interest in using the line for interim trail use subject to possible future railroad use under Section 8(d) of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48, codified at 16 U.S.C. 1247(d) (the Trails Act). The Trails Act directs the Commission not to permit abandonment where a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such "interim use" as a trail; that policy serves "to preserve established railroad rights-of-way for future reactivation of rail service." 16 U.S.C. 1247(d) ("interim [trail] use shall not be treated, for [any] purposes * * * as an abandonment of the use of such rights-of-way for railroad purposes"). See *Preseault* v. *ICC*, 494 U.S. 1, 6-9 (1990). BN thereupon agreed to

negotiate with Seattle. In February 1994, the Commission authorized BN to abandon the Terry Avenue Line and issued a Notice of Interim Trail Use (NITU), under which time would be provided to allow Seattle and BN to negotiate an agreement under the Trails Act under which some portion of the right-of-way would be used for trails. See Pet. App. C1.[5]

b. After the Commission issued its decision authorizing abandonment and its NITU in contemplation of an interim trail use agreement, petitioner filed a timely notice expressing its intent to purchase the westernmost half-mile of the Terry Avenue Line pursuant to Section 10905. It proposed a purchase price of $10. A separate $10 offer for the remaining three miles was filed by the Lake Union Terminal Railroad Company (Lake Union). The offerors claimed that their respective $10 offers were reasonable because BN allegedly lacked marketable title to the underlying right-of-way, and therefore the property had no value. See Pet. 3-4; Pet. App. D2.

BN contested the $10 valuations, arguing that the portions of the line to which it had marketable title had a multi-million dollar value. See Pet. App. C5-C6, D3-D4. Seattle and the Rails to Trails Conservancy

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[5] Under implementing regulations promulgated by the ICC, the ICC issues a NITU when a prospective trail user has requested an interim trail use arrangement and the carrier has indicated its willingness to negotiate such an arrangement. See *Preseault* v. *ICC*, 494 U.S. at 7 n.5. A NITU provides a 180-day period during which the railroad may discontinue service, cancel tariffs, salvage track and other equipment, and also negotiate a voluntary agreement for interim trail use. If an agreement is reached, interim trail use is thereby authorized. If an agreement is not reached, the NITU automatically converts into an effective notice of abandonment. *Ibid.*

(RTC), a national group that promotes the preservation of rail lines for trail use and future rail purposes, also filed objections to the two $10 offers. RTC stated that it "is prepared to offer, and hereby does offer" to pay BN $175,000 for the entire Terry Avenue Line (including $65,000 for the portion of the line sought by petitioner). Pet. App. F3. Seattle, in turn, made a $600,000 cash offer to BN for the portion of the Terry Avenue Line right-of-way outside of the 30-foot-wide strip covered by the Trail Agreements between the City and BN. See Pet. App. C8, C10-C11.[6]

c. The Commission ruled (Pet. App. C1-C17, D1-D8) that the $10 offers from petitioner and Lake Union "are substantially lower than any minimum purchase price BN could reasonably be expected to consider." Pet. App. D6. The Commission held that, in light of RTC's $175,000 offer for the line, and in light of the fact that in its view the two offerors had not met their burden of establishing that BN lacks marketable title to the underlying right-of-way, any valuation of that property for railroad purposes "must include, at a minimum, the $175,000 that BN would be deprived of if the property were conveyed to someone else." Pet. App. C10-C14, C16-C17. Accordingly, the Commission held, the two $10 offers were not *prima facie* reasonable and hence not bona fide, and declined to commence the Section 10905 process. Pet. App. C16, D7.

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[6] Seattle later notified the Commission that, in December 1994, BN and the City entered into an agreement under which the City paid BN $975,000 in cash ($375,000 over its original offer of $600,000) for that part of the Terry Avenue Line. See Govt. C.A. Br. App. C.

3. The court of appeals affirmed. Pet. App. A1-A2. The court held first that the Commission had reasonably concluded, based upon RTC's written offer for both parts of the Terry Avenue Line, "that the petitioners' offer of $10 for each of the two parts were unlikely to equal the acquisition cost of the line." Pet. App. A1 (citing 49 U.S.C. 10905(d)(2)(B)). The court also held that the Commission's findings of fact had been supported by substantial evidence and that its conclusions were reasonable and in accordance with law.

ARGUMENT

This case involves no issue on which the courts of appeals are in conflict, and it involves no issue of general importance. Rather, the Commission's decision was based on its evaluation of the evidence presented to it in this case regarding the market value of a particular railway line. The court of appeals, in turn, correctly held that the Commission's findings of fact regarding that market value were supported by substantial evidence, and that its conclusions were reasonable and in accordance with law. See, *e.g.*, *Ralston Purina Co.* v. *Louisville & N.R.R.*, 426 U.S. 476, 477-478 (1976). There is no basis for further review of that fact-bound holding.

1. Petitioner's principal argument (Pet. 7-10, 12) is that the Commission was not at liberty to rely on RTC's $175,000 offer in evaluating whether petitioner's $10 offer for a half-mile-long railroad in downtown Seattle was bona fide. However, the record shows that RTC made a firm $175,000 written offer[7]

[7] The offer stated that RTC "is prepared to offer, and hereby does offer" to pay BN $175,000 for the entire corridor

for the entire right-of-way at issue.[8] Moreover, the Commission's decision to consider that evidence in deciding whether petitioner's $10 offer is consistent with the Act, which provides that an offer must be likely to equal the acquisition cost of the line, see 49 U.S.C. 10905(d)(2)(B), and with decisions of the courts of appeals and the ICC applying Section 10905. See *Iowa Terminal R.R.* v. *ICC*, 853 F.2d 965, 969-970 (D.C. Cir. 1988) (ICC must consider all written offers submitted to the railroad by third parties in its valuation determinations under Section 10905); *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 668 (7th Cir. 1982); *Portland Traction Co.—Abandonment Exemption—In Multnomah & Clackamas Counties, OR*, ICC Docket No. AB-225 (Sub-No. 2X) (ICC served Jan. 10, 1990) (trail use offers are appropriately considered in determining a line's market value).[9]

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at issue, including $65,000 for the portion of the line sought by petitioner. The offer was good for 30 days. See Pet. App. F3.

[8] Even if petitioner were correct in its claim (Pet. 7-8, 14) that the ICC generally does not take into account unaccepted offers because they may be inflated, such a policy would counsel no different result in this case. RTC's $175,000 offer plainly represented only the *minimum* market value of the line. As we have noted, the record shows (1) that Seattle made a separate $600,000 offer for the portion of the right-of-way not covered by the Trail Agreements (and ultimately paid BN $975,000 for that part of the right-of-way), and (2) that BN was to receive additional non-cash consideration from Seattle under the Trail Agreements.

[9] The cases on which petitioner relies (Pet. 7-10) are inapposite. *Sharp* v. *United States*, 191 U.S. 341 (1903), merely held inadmissible in condemnation proceedings a property owner's uncorroborated testimony regarding alleged oral and non-

Petitioner is also incorrect to claim (Pet. 12, 14) that the existence of the Trail Agreements between BN and Seattle in some manner made it error for the Commission to give weight to RTC's offer. Contrary to petitioner's implication, the Trail Agreements do not show that BN intended to donate any of the property at issue here to Seattle. Rather, as we have explained, the Trail Agreements provided for compensation to BN by establishing a two-component price in return for the grant of the right-of-way. First, Seattle was to assume certain obligations to restore crossings and streets that otherwise would have been the responsibility of BN, so as to compensate the railroad for the portion of the right-of-way that was up to 30 feet in width. Second, Seattle was to pay BN fair market value for the remaining width, to be determined at the time of the transaction. Thus, the record amply supports the Commission's determination that petitioner's $10 offer was not bona fide.

2. Petitioner is also wrong to claim (Pet. 7) that the Commission was obliged to discredit RTC's offer merely because that offer came after petitioner had proposed a $10 valuation. No authority precludes the ICC from considering subsequent offers, and the offer by RTC was foreseeable in light of the longstanding

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binding offers to purchase real estate. *Wyoming & C.R.R.—Abandonment Exemption—Jackson County, CO*, ICC Docket No. 307 (Sub-No. 2X) (ICC served Sept. 15, 1995) (Pet. App. G1-G5), involved the Commission's decision, under the particular circumstances of that case, not to rely on an offer from a railroad salvage company in determining a line's net liquidation value, but instead to rely on the Commission's own assessment of the line's value (which differed by only $50,000 on a valuation of $2.61 million).

plans to use the right-of-way as a trail. The fault is instead petitioner's for not increasing its $10 offer after RTC made its $175,000 offer and after Seattle made its separate $600,000 offer. Given petitioner's failure to adjust its preliminary $10 offer and to explain the gaping discrepancy between its offer and the evidence demonstrating that the line had a substantial market value,[10] the Commission was within its discretion to conclude that the $10 offer was not bona fide and, therefore, that the Section 10905 process should not start.

3. Finally, petitioner contends (Pet. 10-11) that the Commission ignored its duty to preserve and promote rail service here. However, the record shows that, as Section 10905 requires, the Commission gave petitioner the opportunity to seek to purchase the line and to demonstrate that it would be able fully to compensate BN for the line. By the time the Commission issued its decision here, it had become patent that petitioner's $10 offer was not bona fide. The Commission's decision not to prolong its proceedings

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[10] Petitioner questions (Pet. 13, 15-16) the Commission's conclusions regarding the quality of BN's title to, and the marketability of, the two parcels on the half-mile-long portion of the line that petitioner sought. But, as the Commission noted (Pet. App. C11), the title issues in this case are not decisive because the $175,000 offer from RTC and the $600,000 offer from Seattle demonstrate that the market value of the property at issue here substantially exceeds $10 "notwithstanding any assertions or conclusions regarding title." In any event, BN provided the ICC with a legal opinion to the effect that it did have marketable title to one of the two parcels, which supplied the ICC with "a reasonable basis for concluding that, under state law, BN could befound [*sic*] to have marketable title." Pet. App. C14.

was fully consistent with the statutory scheme. See 49 U.S.C. 10905(d).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] That is especially so in light of Congress's intent that abandonment proceedings be expedited. Compare 49 U.S.C. 1a(6)(a) (1976) with 49 U.S.C. 10905(c)-(f), shortening the time from 6 months to 110 days that a railroad seeking to abandon is required to negotiate with a financially responsible potential buyer. Indeed, several provisions of Section 10905 specifically call for prompt abandonment authorization if a sale does not materialize. See 49 U.S.C. 10905(e); 49 U.S.C. 10905(f)(2); 49 U.S.C. 10905(f)(5); see also *Illinois Cent. Gulf R.R.* v. *ICC*, 717 F.2d 408, 410 (7th Cir. 1983) (the purpose of the showing required by 49 U.S.C. 10905(d) is "to prevent unjustified delays of railroad abandonments by screening out frivolous offers made by persons who are unable to fully compensate the railroad for its property"). Neither the Commission nor any court of appeals has interpreted Section 10905(d) to mean that *any* offer to continue rail service, no matter how frivolous, is sufficient to trigger the Section 10905 process.